ORIGINAL

90-7675

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

IN THE MATTER OF THE WELFARE OF

R.A.V.

PETITION FOR A WRIT OF CERTIORARI TO THE

MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

EDWARD J. CLEARY
Counsel of Record
Attorney for Petitioner

409 Midwest Federal Bldg
Saint Paul, MN 55101
(612) 224-3781

MICHAEL F. CROMETT
Of Counsel

1708 American National Bank
Building
Saint Paul, MN 55101
(612) 227-5363

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QUESTIONS PRESENTED

1. May a local government enact a content-based, "hate-crime" ordinance prohibiting the display of symbols, including a Nazi swastika or a burning cross, on public or private property, which one knows or has reason to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender without violating overbreadth and vagueness principles of the First Amendment to the United States Constitution?

2. Can the constitutionality of such a vague and substantially overbroad content-based restraint of expression be saved by a limiting construction, like that used to save the vague and overbroad content-neutral laws, restricting its application to "fighting words" or "imminent lawless action?"

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PETITION FOR A WRIT OF CERTIORARI TO THE

MINNESOTA SUPREME COURT

Petitioner, R.A.V., a juvenile, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Minnesota Supreme Court entered in the above-entitled matter on January 18, 1991.

I.

OPINION BELOW

The opinion of the Minnesota Supreme Court is reported as In the Matter of the Welfare of R.A.V., 464 N.W. 2d 507 (Minn. 1991), and is attached as Appendix A to this Petition. A copy of the final judgment appears in Appendix B.

II.

JURISDICTION

On July 16, 1990, the District Court of Ramsey County, Minnesota, held that St. Paul City Ordinance section 292.02 was unconstitutional. The state filed a timely Notice of Appeal and Petition for Accelerated Review by the Minnesota Supreme Court. On August 3, 1990, the Minnesota Supreme Court granted the Petition for Accelerated Review. On January 18, 1991, the

Minnesota Supreme Court reversed the district court order and remanded the case for trial. Final judgment was entered by the court on February 27, 1991.

This Court has jurisdiction to review the judgment of the Minnesota Supreme Court by Writ of Certiorari pursuant to Title 28, U.S.C. Section 1257 (a).

III.

CONSTITUTIONAL PROVISION INVOLVED

First Amendment to the United States Constitution:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Fourteenth Amendment to the United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IV.

ORDINANCE INVOLVED

Saint Paul City Ordinance 292.02, Disorderly Conduct:

"Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed or religion or gender commits disorderly conduct and shall be guilty of a misdemeanor."

V.

STATEMENT OF THE CASE

On June 25, 1990, a petition was filed in Ramsey County District Court, Juvenile Division, alleging that R.A.V. was delinquent because he committed the offenses of gross misdemeanor Assault in the Fourth Degree (bias-motivated) pursuant to state statute and misdemeanor Assault (bias-motivated) pursuant to St. Paul City Ordinance. R.A.V. denied the petition and was held in custody.

On July 5, 1990, the state dismissed the misdemeanor Assault charge and added a charge alleging that petitioner committed the offense of misdemeanor Disorderly Conduct (bias-motivated) in violation of the St. Paul city ordinance.

Petitioner requested a hearing to challenge the constitutionality of this ordinance. Briefs were submitted and the motion was argued before the District Court on July 13, 1990. The court took the motion under advisement. In its brief and at argument, the state conceded that the ordinance proscribed expressive conduct.

On July 16, 1990, the district court held that St. Paul City Ordinance § 292.02 was unconstitutional. The court, citing Texas v. Johnson, 491 U.S. 397 (1989), and United States v. Eichman, ___U.S.___, 110 SCt 2404 (1990), found that the ordinance was content-based, that it failed to serve a compelling state interest, and that it was not narrowly drawn to achieve that end.

The state filed a timely Notice of Appeal, as well as a Petition for Accelerated Review by the Minnesota Supreme Court which was granted on August 3, 1990. Briefs were filed and oral argument was held before the Minnesota Supreme Court on December 4, 1990.

On January 18, 1991, the Minnesota Supreme Court held that the ordinance was not substantially overbroad because it could be narrowly interpreted to prohibit only expressive conduct falling outside the protection of the First Amendment.

Without citing legal authority, the Minnesota Supreme Court stated that the burning of a cross was a symbol of violence and hatred based on "virulent notions of racial supremacy," that it was "deplorable conduct the City of Saint Paul may without question prohibit," and that it was the "responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear." In the Matter of the Welfare of R.A.V., 464 N.W. 2d 507, 508 (Minn. 1991); Appendix A-2.

The Court acknowledged petitioner's right to challenge this ordinance on its face even though his conduct may have been subject to prosecution. The Court noted this exception to the general rules of standing is intended to overcome the "danger of tolerating, in the area of the First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." Id. (citing NAACP v. Button, 371 U.S. 415, 433 (1973)); Appendix A-3.

However, citing three decisions involving content-neutral laws, New York v. Ferber, 458 U.S. 747 (1982), Lewis v. City of New Orleans, 415 U.S. 130 (1973), and In re S.L.J., 263 N.W. 2d 412, 419 (Minn. 1978), the Court concluded that the ordinance could be narrowly construed to reach only unprotected conduct. Id. at 509-10; Appendix A-3, 4.

The Minnesota Supreme Court attempted to distinguish this Court's decision in Texas v. Johnson, supra, by suggesting that the Saint Paul City Ordinance required a showing that "alarm, anger or resentment in others" had been aroused by the display of symbols. Id., at 510; Appendix A-4.

The Court relied on its 1978 decision in In re S.L.J., supra, in which it narrowly construed a statute prohibiting "offensive, obscene, or abusive language or * * * boisterous and noisy conduct tending to arouse alarm, anger, or resentment in others" to refer to only "fighting words." The Court held that limiting Saint Paul City Ordinance § 292.02 to imminent lawless action or "fighting words" allowed it to withstand constitutional challenge. Id.; Appendix A-4.

VI.

REASONS FOR GRANTING THE WRIT

A.

WHETHER LOCAL COMMUNITIES MAY ENACT "HATE-CRIME" LAWS, I.E., CONTENT-BASED RESTRICTIONS ON EXPRESSIVE CONDUCT, IS A RECURRING ISSUE OF NATIONWIDE IMPORTANCE WHICH THIS COURT SHOULD DECIDE

With our country's increased awareness of the damage inflicted by racial, religious, and ethnic slurs, many states and municipalities are enacting criminal statutes and ordinances prohibiting and punishing such conduct.

The State of Minnesota enacted the following "hate-crime" statutes in 1989: assault, Minn. Stat. § 609.2231 subd. 4; criminal damage to property, Minn. Stat. § 609.595 subd. 1a and b, subd. 2, and subd. 3; trespass, Minn. Stat. § 609.605 subd. 3; intrusion on privacy, Minn. Stat. § 609.746 subd. 3; obscene or harassing telephone calls, Minn. Stat. § 609.79; and letter, telegram, or package harassment, Minn. Stat. § 609.795 subd. 2.

The City of Saint Paul enacted the law at issue in this case, Section 292.02, bias-motivated disorderly conduct, in 1989. This ordinance was amended in 1990 to include symbols which arouse anger, alarm or resentment in others on the basis of "gender." In 1989, the City of Saint Paul also enacted Ordinance Section 292.01, bias-motivated assault.

Other states have also enacted "hate-crime" legislation. See Conn. Gen. Stat. § 46a-58 (1989); Fla. Stat. § 876.17 and 876.18 (1989); O.C. Ga. § 16-11-37(b) (1989); Idaho Code § 17-7902 (1989); 1990 Ia. ALS 2197; 1190 IA. SF 2197; Md. Ann. Code, Art. 27, § 10A; Mont. Code Anno., § 45-5-221 (1989); N.J. Stat. § 2C:33-10, 2C:33-11 (1987); N.C. Gen. Stat. § 14-12.12; Va. Code Ann. § 18.2-423 (1989); and REW 9A.36.080 (1989) (Washington State).

Newspaper and magazine articles demonstrate the nationwide effort to legislate racial, ethnic, and religious sensitivity. Media coverage reflects the controversy surrounding the efforts of other states and local communities to prevent expression which may anger or alarm others on the basis of race. See Time Magazine, March 25, 1991 (Duncan, South Carolina prohibiting display of Confederate flag); Saint Paul Pioneer Press, (Associated Press-Detroit), December 29, 1990 (Michigan law prohibiting ethnic intimidation); New York Times, December 6, 1990 (Georgia law prohibiting display of Ku Klux Klan hood).

Even the nation's colleges and universities are experiencing a type of reverse intolerance against unpopular opinion and increasing "intellectual intimidation." The results are unprecedented prohibitions on expressive conduct that jeopardize the First Amendment guarantee of freedom of speech.

> Taboos on fields of inquiry are increasingly accompanied by bans on language. According to a growing number of academic theorists, the First Amendment guarantee of freedom of speech can be legitimately laid aside for worthy reasons. Chief among them is if it interferes with what is billed as a new and nonconstitutional right: the right to avoid having one's feelings hurt, or what Botstein calls a "subjective interpretation of harm." Thus dozens of universities have introduced tough new codes prohibiting speech that leads to, among other things, a "demeaning atmosphere," and some of them have suspended students for using epithets toward blacks,

> homosexuals or other minorities, not only in classrooms but also in dormitories, in intramural sports and even off campus altogether. Time Magazine, April 1, 1991, p.67.

See also Chicago Tribune, (March 18, 1991).[1]

Clearly there has been a nationwide movement towards stifling expressive conduct that the majority finds offensive or demeaning. Thus well-meaning public officials have enacted 'bias-motivated' legislation that attempts to address the legitimate concern our society has regarding displays of intolerance among its citizens. Since such legislation is politically popular as it is aimed at unpopular minorities, it will almost certainly continue to be enacted in the immediate future.

However, displays of racial, ethnic, religious or gender intolerance reflect varied political viewpoints within our pluristic society and are not susceptible to constitutionally valid restrictions.[2]

Consequently, legislation attempting to regulate the expression of unpopular ideas such as racial, ethnic, or

[1] The article also indicates that a bill was recently introduced in the United States Congress to ban speech codes at private colleges.

[2] "The debate transcends traditional conservative-liberal political lines, with civil libertarians, as well as minorities themselves, divided on the issue." Chicago Tribune, March 18, 1991.

religious supremacy has generated significant litigation. See e.g., Brandenburg v. Ohio, 395 U.S. 444, 445 (1969); Terminiello v. Chicago, 337 U.S. 1 (1949); Cantwell v. Connecticut, 310 U.S. 296 (1940); Collin v. Smith, 578 F 2d 1197 (7 Cir. 1978); Knights of Ku Klux Klan v. Martin Luther King, Jr. Worshippers, 735 F. Supp. 745 (M.D. Tenn. 1990).

The decision of the Minnesota Supreme Court in this case purports to be a constitutional analysis of the ordinance on its face. However, the Court focuses on only one symbol, a burning cross, and states that it is "an unmistakable symbol" of, among others, "hatred based on virulent notions of racial supremacy." In the Matter of the Welfare of R.A.V., supra at 508; Appendix A-2. In the footnote following, the Court cites a law review article: "There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups." Id.

While as a society, it may be our responsibility or obligation to confront such "notions," it is a violation of the First Amendment freedom of speech clause to attempt to prohibit the expression of racial or ethnic supremacy.[3] These

[3] As Justice Brandeis stated over a half century ago, " . . . the remedy to be applied is more speech, not enforced silence." Whitney v. California, 274 U.S. 357, 377 (1927).

"notions" may take the form of a Nazi swastika, a Confederate flag, a white sheet and hood, or a burning cross, all of which may offend many citizens, particularly African-Americans and Jewish Americans. Other symbols which might offend citizens on the basis of creed or gender are likewise prohibited under this sweeping ordinance.

Petitioner's case provides this Court with an opportunity to establish the parameters for the proscription of expressive conduct by local communities. In addition, by reviewing petitioner's case, this Court could outline the parameters of the First Amendment for lower courts as they interpret "hate-crime" legislation and its progeny in the future.

B.

THIS CASE PROVIDES THE COURT WITH THE OPPORTUNITY TO DELINEATE THE BOUNDARIES BETWEEN EXPRESSIVE CONDUCT PROTECTED UNDER THE FIRST AMENDMENT, AS REFLECTED IN UNITED STATES V. EICHMAN AND TEXAS V. JOHNSON, AND PERMISSIBLE RESTRICTIONS ON SUCH EXPRESSION, AN ISSUE WHICH WILL RECUR UNTIL DECIDED BY THIS COURT

In recent years, this Court has been forced repeatedly to review legislation which seeks to prohibit conduct expressing unpopular views but in doing so encroaches upon the First Amendment to the United States Constitution. See United States v. Eichman, ___ U.S.___, 110 SCt 2404 (1990); Texas v. Johnson,

491 U.S. 397 (1989); Ward v. Rock Against Racism, 491 U.S. 781 (1989); Boos v. Barry, 485 U.S. 312 (1988).

Recent opinions of this Court regarding treatment of the United States flag have been used by other courts for guidance in deciding First Amendment issues. These courts have had difficulty in applying those holdings to cases not involving the American flag.

The decision of the state supreme court in this case demonstrates this difficulty. The Minnesota Supreme Court interpreted this Court's decision in Texas v. Johnson, supra, as permitting states to enact laws prohibiting flag burning where a person knows or has reason to know the conduct will arouse anger, alarm, or resentment in others as long as the law is narrowly construed to reach only "fighting words" or "imminent lawless action." In the Matter of the Welfare of R.A.V., supra at 510; Appendix A-4. This was not the holding of Texas v. Johnson, though the state court chose to focus on certain language from that opinion to justify its conclusion.

The state court's decision sends an ominous message to law-makers in the area of "hate-crime" legislation. It suggests to other courts and law-making bodies, that they may prohibit expressive conduct, such as the display of unpopular symbols which others may find objectionable, by classifying such

expressive conduct as "fighting words." This would leave to law enforcement officials the subjective decision of whether or not to prosecute unpopular expressive conduct and to judges and juries the decision of whether or not the conduct constituted "fighting words." It is inconsistent with the First Amendment to permit the majority to decide whether or not unpopular views expressed by an individual constitute "fighting words." For this reason, this Court has found it necessary to distinguish between content-neutral laws and content-based laws, subjecting the latter to be subjected to the most exacting scrutiny. Ward v. Rock Against Racism, 491 U.S. 781, ___, 109 SCt 2746, 2758 n. 6 (1989); Boos v. Barry, 485 U.S. 312, 321 (1988).

This case provides a logical and appropriate setting for this Court to delineate the parameters of its recent flag burning cases and to thus clarify the standards for deciding the constitutionality of "hate-crime" legislation.

C.

THIS CASE PROVIDES THE OPPORTUNITY TO DECIDE THE IMPORTANT AND RECURRING NATIONAL ISSUE OF WHETHER A CONTENT-BASED RESTRICTION ON EXPRESSIVE CONDUCT, WHICH IS SUBSTANTIALLY OVERBROAD AND VAGUE, CAN BE NARROWLY INTERPRETED IN THE SAME MANNER AS A CONTENT-NEUTRAL LAW TO PROHIBIT ONLY EXPRESSIVE CONDUCT WHICH FALLS OUTSIDE OF THE PROTECTION OF THE FIRST AMENDMENT

The Minnesota Supreme Court ignored the significance of the distinguishing feature of the Saint Paul ordinance, that it is a content-based regulation. Instead, the Court chose to interpret this ordinance in the same manner it had interpreted a content-neutral ordinance twelve years earlier. In re S.L.J., 263 N.W. 2d 412 (Minn. 1978). In that case, the Court noted that other states had been allowed to narrowly construe content-neutral statutes involving disorderly conduct and breach of the peace. However, the Court did not cite any authority for narrowly construing content-based laws. In re S.L.J., supra at 419 n.5.

In In re S.L.J., supra, the Minnesota Supreme Court spared the state disorderly conduct statute by a narrow interpretation. Thus, it is already the law in the State of Minnesota that whoever engages in "offensive, obscene, or abusive language or in boisterous and noisy conduct" which constitutes "fighting words" can be prosecuted and found guilty of disorderly conduct. In re S.L.J., supra; Minn. Stat. § 609.72.

Since the state already has a law prohibiting "fighting words" and "imminent lawless action," the state's interest in maintaining order is not implicated in this case. See e.g., Texas v. Johnson, 491 U.S. 397 (1989). Just as Texas did not need a special law to control lawlessness associated with flag

burning, the City of Saint Paul ordinance in question is an unnecessary abridgement of protected expressive conduct under the First Amendment because an existing content-neutral statute satisfies any legitimate concern.[4]

In enacting the ordinance at issue the City of Saint Paul relied on the language, "arouses anger, alarm or resentment in others," which was found to be unconstitutional on its face in In re S.L.J., supra, at 419. This language became the basis for the ordinance. No effort was made to limit or correct the language which had been held to be overbroad and vague in In re S.L.J., supra at 418.

In addition to that language, the City of Saint Paul added two more elements to its "hate-crime" law: (1) "whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika," and (2) "on the basis of race, color, creed or religion or gender commits disorderly conduct."

These additional elements indicate clearly that this ordinance is content-based and that, unlike content-neutral laws,

[4] Of course, the only conduct which may legitimately be prohibited under this substantially overbroad and vague ordinance, burning a cross which threatens a crime of violence with the intent to terrorize another, is punishable as a felony offense under the terroristic threats statute. Minn. Stat. § 609.713.

this ordinance cannot be saved from complete invalidation by a narrow interpretation. These distinguishing factors clearly demonstrate that it is the content of the expression which is to be prohibited. City of Houston v. Hill, 482 U.S. 451 (1987).

As this Court has noted, abstention, i.e., allowing a limiting construction of an ordinance when such a construction is readily available, is particularly inappropriate when it involves a First Amendment challenge to a law on its face. City of Houston v. Hill, 482 U.S. 451, 452 (1987). When a substantially overbroad law is plain and unambiguous it is not susceptible to a limiting construction because its literal wording punishes and may deter a significant range of protected expression. City of Houston v. Hill, supra, at 468.

The language of the Saint Paul ordinance is "plain and unambiguous." The ordinance is not susceptible to a limiting construction. This Court must make it clear that the saving construction available in reviewing content-neutral laws is neither applicable nor appropriate to situations involving content-based laws, particularly "hate-crime" legislation. The potential for chilling protected expression is too great to permit such a construction to save "content-based" restrictions on expressive conduct.

As this Court stated in City of Houston v. Hill, supra at 472, "(a) certain amount of expressive disorder not only is inevitable in a society committed to individual freedom but must itself be protected if that freedom would survive."

VII.

CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Minnesota Supreme Court in this matter.

Respectfully submitted,

EDWARD J. CLEARY
409 Midwest Federal Building
Saint Paul, MN 55101
(612) 224-3781

COUNSEL OF RECORD
ATTORNEY FOR PETITIONER

APPENDIX A. Opinion of the Minnesota Supreme Court, A 1-5

dismissed charge prior to trial on grounds that ordinance censored expressive conduct in violation of First Amendment. City appealed. The Supreme Court, Tomljanovich, J., held that ordinance was not substantially overbroad because it could be narrowly interpreted to prohibit only expressive conduct which falls outside First Amendment protection.

Reversed and remanded.

1. Constitutional Law ⇐90.1(1)
Disorderly Conduct ⇐1

Bias-motivated disorderly conduct ordinance was not substantially overbroad, where ordinance could be narrowly interpreted to prohibit only expressive conduct amounting to fighting words or imminent lawless action falling outside First Amendment protection. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ⇐42.1(3)

Overbreadth doctrine, as exception to standing requirements peculiar to disputes regarding extent to which First Amendment protects speech and other expressive conduct, permits individual to facially challenge provision even though individual engaged in conduct that is itself subject to prosecution. U.S.C.A. Const.Amend. 1.

3. Constitutional Law ⇐82(3)

Overbreadth doctrine is intended to overcome danger of tolerating, in area of First Amendment freedoms, existence of penal statute susceptible of sweeping and improper application. U.S.C.A. Const. Amend. 1.

4. Constitutional Law ⇐82(3)

If challenged provision is substantially overbroad, law may not be enforced against anyone, including party before court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation. U.S.C.A. Const.Amend. 1.

5. Constitutional Law ⇐82(3)

Where overbreadth of challenged law is both real and substantial, and where words of law simply leave no room for narrowing construction, so that in all its applications law creates unnecessary risk of chilling free speech, court will completely invalidate it; when possible, however, court narrowly construes law subject to facial overbreadth attack so as to limit its scope to conduct which falls outside First Amendment protection while clearly prohibiting its application to constitutionally protected expression. U.S.C.A. Const.Amend. 1.

In the Matter of the
WELFARE OF R.A.V.

No. C8-90-1656.

Supreme Court of Minnesota.

Jan. 18, 1991.

Individual was charged with violating city ordinance prohibiting bias-motivated disorderly conduct. The District Court, Ramsey County, Charles A. Flinn, Jr., J.,

Syllabus by the Court

St. Paul, Minn.Leg.Code § 292.02 (1990) prohibiting bias-motivated disorderly conduct is not substantially overbroad because it can be narrowly interpreted to prohibit only expressive conduct that falls outside first amendment protection.

Steven C. DeCoster, Asst. County Atty., St. Paul, for appellant.

Edward J. Cleary, St. Paul, for respondent.

Steven W. Zachary, St. Paul, for NAACP, amicus curiae.

Mark S. Weitz, Timothy R. Meyerson, Lawrence P. Schaefer, Leonard, Street and Deinard, Minneapolis, Jeffrey D. Sineusky, Stephen M. Freeman, Michael A. Sandberg, New York City, amicus curiae, for Anti-Defamation League of B'Nai B'Rith.

Robert J. Alfton, City Atty., and Mitchell Lewis Rothman, Deputy City Atty., Minneapolis, amicus curiae, for City of Minneapolis.

Heard, considered and decided by the court en banc.

TOMLJANOVICH, Justice.

The City of St. Paul alleges that between 1:00 a.m. and 3:00 a.m. on June 21, 1990, R.A.V. participated in burning a cross inside the fenced yard of an African American family's home. In connection with this incident, the City charged R.A.V. with violating St. Paul, Minn.Leg.Code § 292.02 (1990), which provides that

> [w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. The trial court, however, dismissed the charge prior to trial on the ground that the ordinance censors expressive conduct in violation of the first amendment to the United States Constitution. The City now appeals that decision, contending that the ordinance can be narrowly construed to reach only conduct that falls outside first amendment protection. In order to prevail, the City must demonstrate "clearly and unequivocally, first, that the trial court erred in its judgment and, second, that unless reversed, the error will have a critical impact on the outcome of the trial." *State v. Joon Kyu Kim*, 398 N.W.2d 544, 547 (Minn.1987) (citing *State v. Webber*, 262 N.W.2d 157, 159 (Minn.1977)).

Burning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy.[1] It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.

R.A.V. does not dispute that the City may prosecute individuals who engage in such actions as he is alleged to have perpetrated. Rather, he challenges the particular ordinance under which he was charged

1. *See* Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L.Rev. 2320, 2365-66 (1989):

> There are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution, and degradation of certain groups. The swastika, the Klan robes, the burning cross are examples of signs—like all signs—that have no meaning on their own, but that convey a powerful message to both the user and the recipient of the sign in context.

Id. (footnotes omitted).

on the ground that it is substantially overbroad. In essence, R.A.V. contends that the St. Paul bias-motivated disorderly conduct ordinance potentially censors so many constitutionally protected activities on its face that it must be completely invalidated. We disagree.

[1-4]. The overbreadth doctrine, an exception to standing requirements peculiar to disputes regarding the extent to which the first amendment protects speech and other expressive conduct, permits an individual to facially challenge a provision even though that individual engaged in conduct that is itself subject to prosecution. *See State v. Krawsky*, 426 N.W.2d 875, 876 (Minn.1988); *see also New York v. Ferber*, 458 U.S. 747, 768-69, 102 S.Ct. 3348, 3360-61, 73 L.Ed.2d 1113 (1982). This exception to the general rules of standing is intended to overcome the "danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." *NAACP v. Button*, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963); *see also Dombroski v. Pfister*, 380 U.S. 479, 487, 85 S.Ct. 1116, 1121, 14 L.Ed.2d 22 (1965). Thus,

> an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens others not before the court—those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503, 105 S.Ct. 2794, 2801, 86 L.Ed.2d 394 (1985). If the challenged provision is substantially overbroad, "the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction or partial invalidation." *Id.* at 503-04, 105 S.Ct. at 2801-02 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)).

[5] While the overbreadth doctrine is clearly essential to the protection of free expression, the complete invalidation of legislatively adopted laws it permits is "strong medicine" that this court does not hastily prescribe. *See Broadrick v. Oklahoma*, 413 U.S. at 613, 93 S.Ct. at 2916. Where the overbreadth of the challenged law is both "real" and "substantial," *see New York v. Ferber*, 458 U.S. at 770, 102 S.Ct. at 3361, and where "the words of the [law] simply leave no room for a narrowing construction," *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 575, 107 S.Ct. 2568, 2572, 96 L.Ed.2d 500 (1987), "so that in all its applications the [law] creates an unnecessary risk of chilling free speech," *Secretary of State of Md. v. Joseph H. Munson Co.* 467 U.S. 947, 968, 104 S.Ct. 2839, 2853, 81 L.Ed.2d 786 (1984), this court will completely invalidate it. When possible, however, this court narrowly construes a law subject to facial overbreadth attack so as to limit its scope to conduct that falls outside first amendment protection while clearly prohibiting its application to constitutionally protected expression. *See In re S.L.J.*, 263 N.W.2d 412, 419 (Minn.1978) (disorderly conduct statute limited to "fighting words" to preserve constitutionality); *New York v. Ferber*, 458 U.S. at 769 n. 24, 102 S.Ct. at 3361 n. 24 ("If the invalid reach of the law is cured [by narrow judicial construction], there is no longer reason for proscribing the statute's application to unprotected conduct." *Id.*); *Lewis v. City of New Orleans*, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1973) (invalidating state statute where state supreme court did not narrow construction on previous remand). We conclude that the ordinance in question can be narrowly interpreted to reach only unprotected conduct, thereby sufficiently decreasing the possibility that those who wish to engage in protected expressive conduct will be dissuaded from doing so by the potential of prosecution and sparing that ordinance from the complete invalidation R.A.V. requests.

Although the United States Supreme Court's recent decision in *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105

L.Ed.2d 342 (1989) did not directly address an overbreadth challenge,[2] that decision is instructive as to the scope of constitutionally protected expressive conduct. In *Johnson*, the Court held that Texas could not prosecute an individual for burning a United States flag outside Dallas City Hall under the state's "desecration of venerated objects" statute. *See id.* 109 S.Ct. at 2548. The Court noted that the state had *not* alleged that Johnson's conduct actually disturbed the peace or that it threatened to immediately do so. *Id.* at 2541, 2548. Rather, the state contended that *every* flag burning necessarily possessed the potential to disrupt public safety and order, which empowered it to censor all such conduct. *Id.* at 2542. In rejecting this argument, the Court stated that the first amendment does not permit "the Government to *assume* that *every* expression of a provocative idea will incite a riot, but [instead requires] careful consideration of the *actual circumstances* surrounding such expression." *Id.* (emphasis added). Although in prosecuting Johnson, the state made such an impermissible assumption, the Court clearly indicated that its decision reversing Johnson's conviction did not alter or undermine the states' authority to prohibit expressive conduct likely to provoke imminent lawless action, *id.* (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447, 89 S.Ct. 1827, 1829, 23 L.Ed.2d 430 (1969)), or constituting "fighting words," *id.* (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942))—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 572, 62 S.Ct. at 769.

Unlike the flag desecration statute at issue in *Texas v. Johnson*, the challenged St. Paul ordinance does not on its face assume that any cross burning, irrespective of the particular context in which it occurs, is subject to prosecution. Rather, the ordinance censors only those displays that one knows or should know will create anger, alarm or resentment based on racial, ethnic, gender or religious bias. In *In re S.L.J.*, 263 N.W.2d 412 (Minn.1978), this court narrowly construed Minn.Stat. § 609.72, subd. 1(3) (1990), which prohibits "offensive, obscene, or abusive language or • • • boisterous and noisy conduct tending reasonably to arouse *alarm, anger, or resentment in others*," (emphasis added) to refer only to "fighting words," *S.L.J.*, 263 N.W.2d at 419, thereby preserving it in the face of an overbreadth attack. Similarly limited to expressive conduct that amounts to "fighting words"—conduct that itself inflicts injury or tends to incite immediate violence, *see Chaplinsky v. New Hampshire*, 315 U.S. at 572, 62 S.Ct. at 769—the ordinance in question withstands constitutional challenge.

St. Paul's bias-motivated disorderly conduct ordinance is also constitutional to the extent it prohibits conduct that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. at 447, 89 S.Ct. at 1829 (footnote omitted). Where the "anger, alarm or resentment" the ordinance speaks of rises to the level of "imminent lawless action," *id.* at 449, 89 S.Ct. at 1830, the City is permitted to intervene and censor the provocative conduct. *See Texas v. Johnson*, 109 S.Ct. at 2542. Because the City's disorderly conduct ordinance is reasonably subject to an interpretation limiting its scope to such conduct as *Brandenburg* places outside first amendment protection, we conclude that it is not substantially overbroad.[3]

2. The Court avoided Johnson's claim that the statute was substantially overbroad by concluding that his particular conduct—burning a flag without threatening public safety or order—was itself protected expression and that his conviction was thus unconstitutional. *See Texas v. Johnson*, 109 S.Ct. at 2538 n. 3.

3. The St. Paul ordinance is significantly different from the provision the United States Supreme Court invalidated in *Board of Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987). That provision banned all "First Amendment activities" from the central terminal area of Los Angeles International Airport. *Id.* at 571, 107 S.Ct. at 2570. The Court concluded the provision could not be preserved because its language "simply [left] no room for a narrowing construction." *Id.* at 575, 107 S.Ct. at 2572. *See also Secretary of State of Md. v. Joseph H. Mun-*

In upholding the challenged ordinance against R.A.V.'s constitutional attack, we do not take lightly the first amendment issues that his attack raises. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 109 S.Ct. at 2544. "Resort to epithets or personal abuse," however, "is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act [raises] no question under that instrument." *Cantwell v. Connecticut*, 310 U.S. 296, 309–10, 60 S.Ct. 900, 905–06, 84 L.Ed. 1213 (1940). Although the St. Paul ordinance should have been more carefully drafted, it can be interpreted so as to reach only those expressions of hatred and resorts to bias-motivated personal abuse that the first amendment does not protect. So interpreted, the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order, *see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980), and therefore is not prohibited by the first amendment.

We therefore reverse the trial court's pretrial order declaring the City of St. Paul's bias-motivated disorderly conduct ordinance unconstitutional. Count two of the amended juvenile petition charging R.A.V. with violating that ordinance is reinstated and the case is remanded for trial.

GARDEBRING, J., took no part.

son Co., 467 U.S. at 965–67, 104 S.Ct. at 2851–53 (statute limiting expenses of all charitable fund raising operations not subject to limiting construction); *cf. CSC v. Letter Carriers*, 413 U.S. 548, 580–81, 93 S.Ct. 2880, 2897–98, 37 L.Ed.2d 796 (1973) (invalidation improper where statute "covers a whole range of easily identifiable and constitutionally proscribable * * * conduct").

APPENDIX B. Judgment, B 1

STATE OF MINNESOTA

☒ Supreme Court
☐ Court Of Appeals

In the Matter of the Welfare of
R.A.V.

JUDGMENT

C8-90-1656

Appellate Court Case Number

89D1231

Trial Court Case Number

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the District *Court within and for the County of* Ramsey *of the Court below, herein appealed from, to wit, of the* reversed *be and the same hereby is*

reversed in accordance with the opinion

and that judgment be entered accordingly. A certified copy of the entry of judgment and the Court's decision is herein transmitted and made part of the remittitur.

Dated and signed: FOR THE COURT 2-27-91 *Dated* *Attest:* Frederick K. Grittner *Clerk of the Appellate Courts*

By: K. Leidmann *Assistant Clerk*

Form APL-310